IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

CHRISTOPHER CARL ROBINSON,
Defendant-Appellee.
_____/

Supreme Court
Docket No: 125441

Court Of Appeals No: 252755

Lower Court No: 02-26516-FH

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

Ronald J. Frantz, P 27414
Prosecuting Attorney
Attorney For Plaintiff

By:

Jon Hulsing, P44682
Assistant Prosecutor
Attorney for Plaintiff

414 Washington St., Room 208
Grand Haven, MI 49417
(616) 846-8215

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

OTHER SOURCES

STATEMENT OF APPELLATE JURISDICTION

Under MCR 7.203(E), appeals by the prosecution in a criminal case are governed by MCL 770.12. That statute allows the prosecution an appeal of right from a final order of the circuit court where there is no constitutional bar to further proceedings. Plaintiff appeals the trial court's dismissal dated December 4, 2003.

One of the issues before this Court will determine whether or not the prosecution's appeal in this case is consistent with the double jeopardy clauses of the Federal and State Constitutions.

STATEMENT OF QUESTIONS INVOLVED

I

A conviction for perjury simply requires that the prosecution prove all of the elements of that offense beyond a reasonable doubt to the satisfaction of the trier of fact. "Corroboration" is not mentioned in the perjury statute as an element of that offense, nor has the case law firmly embraced the concept of "corroboration" as an element of perjury. Is corroboration an element of perjury?

Plaintiff says, "No."
Defendant says, "Yes."
Trial court said, "Yes."
Court Of Appeals did not answer

II

The double jeopardy clause bars retrial after acquittal. A directed verdict is an acquittal only where it represents a resolution of some or all of the factual elements of the charged offense. *Nix* held that a directed verdict based upon an error of law not relating to the factual resolution of the elements of the crime bars retrial. Should *Nix* be overruled?

Plaintiff says, "Yes."
Defendant says, "No."
Trial court did not answer.
Court Of Appeals did not answer.

III

Corroboration is not an element of perjury. A dismissal based upon an erroneous legal ruling not relating to the sufficiency of the evidence does not implicate the double jeopardy clause of the Fifth Amendment. Is retrial permitted where the trial court dismissed the case for legal reasons not related to the sufficiency of the evidence?

Plaintiff says, "Yes."
Defendant says, "No."
Trial court did not answer.
Court Of Appeals did not answer.

STATEMENT OF FACTS

Defendant was charged with perjury. This case began by Officer Ercole arresting Timothy Polak for drunk driving. It was, and is, Plaintiff's theory that at Polak's drunk driving trial, Defendant falsely testified that Defendant was driving the vehicle, not Polak. The testimony during the perjury trial paralleled the testimony and evidence at Polak's drunk driving trial.

Officer Ercole was running stationary radar in a marked police car when he noticed a 1997 black Chevy pickup traveling eastbound at an excessive speed (TT 22-24; Appendix p. 5a - 7a). The officer pulled out right behind the vehicle which then pulled into a parking lot and stopped right by the door to a convenience store (TT 27-28; Appendix p. 8a - 9a). The Officer testified:

> A Two people immediately–as fast as that car came to a stop, two people shot out of that car. One went out of the passenger's side. One went out of the driver's side.
>
> * * *
>
> Q Who got out of the driver's side of the vehicle?
>
> A Mr. Timothy Polak did.
>
> Q . . .[W]ere you able to determine who the registered owner of that black Chevy was?
>
> A Yes. It was the driver of the motor vehicle, Mr. Polak, was the registered owner.
>
> Q Who got out of the passenger side of that vehicle?
>
> A Mr. Robinson, the defendant. (TT 31-32; Appendix p.10a - 11a).

In the presence of Defendant, the officer"ran" Polak through a series of dexterity tests. Upon the conclusion of those tests, the officer arrested Polak for drunk driving. Robinson never

protested or informed the officer that Polak, Defendant's friend, was not driving the Chevy. (TT 42-44; Appendix p. 12a - 15a).

Officer Ercole's testimony is best summarized in the following:

> Q . . .[Why] isn't there any doubt in your mind as to who was driving the vehicle on that date, March 8th?
>
> A I saw the vehicle stop. I saw it–Isaw it proceeding through the parking lot, and as quick as that vehicle stopped, two people got out. There was no way on this earth that two people can switch seats without me noticing. I've seen it happen dozens of times, and it is very visible, and it's not easy to do, especially when you're moving in a split second. It's impossible.

Plaintiff prosecuted Polak for drunk driving. A trial was held on July 25, 2002, in the Grand Haven District Court. Polak's defense was that Robinson was driving the car. (TT 44-45; Appendix p. 15a - 16a). Defendant's district court testimony in which he claimed to have been the driver was read into the record:

> Q . . .[W]ere you driving Tim's [Polak's] vehicle?
>
> A Yes, sir.
>
> Q How come?
>
> A Because he had had too much to drink (TT 74; Appendix p. 17a).
>
> * * *
>
> Q What was said [after the traffic stop]?
>
> A He [Ercole] said, "Who's driving?"
>
> * * *
>
> Q All right. And what did you say?
>
> A I said, "I don't know."
>
> Q Why did you say that?

A Because I didn't want to incriminate myself (TT 76-77; Appendix p. 18a - 19a).

* * *

[Cross examination]

Q Were you intoxicated?

A No, not to my knowledge. I didn't, you know, test myself.

Q All right. So let's get this straight. You're sober, right?

A According to me.

Q On the 8th, your buddy is intoxicated, right?

A Right

Q You're driving the vehicle, right?

A Right.

Q You watched Officer Ercole administer field dexterity tests, right?

A Right.

Q . . . You know that he thinks that Tim is the driver, correct?

A Correct.

Q You're sober, and you don't say anything, do you?

A No, I didn't.

Q You didn't say one word?

A No. (TT 80-81; Appendix p.20a - 21a)

Upon conclusion of Plaintiff's case in chief, Defendant moved to have the charges dismissed. (TT 83; Appendix p. 22a) The trial court granted this request, not on the merits of the case, but because the trial court believed that the legal requirement of corroboration (the "two witness rule") was not met. (TT 95; Appendix p. 23a - 31a).

On December 4, 2003, the trial court signed an order dismissing the charge (Appendix p. 36a). On December 11, 2003, Plaintiff filed a timely appeal with the Court of Appeals. On January 6, 2004, the Court of Appeals dismissed Plaintiff's appeal for lack of jurisdiction (Appendix p. 39a). The Supreme Court granted Plaintiff's Application for leave to appeal on June 11, 2004 (Appendix p. 40a). Plaintiff now files this brief.

I

A conviction for perjury simply requires that the prosecution prove all of the elements of that offense beyond a reasonable doubt to the satisfaction of the trier of fact. "Corroboration" is not mentioned in the perjury statute as an element of that offense, nor has the case law firmly embraced the concept of "corroboration" as an element of perjury. Therefore, corroboration is not an element of perjury.

Standard of Review

This case requires this Court to determine whether corroboration of evidence is an element of the statutory offense of perjury. Therefore, review is *de novo.*[1]

The trial court took this case out of the hands of the jury and dismissed the case because the prosecution's key witness' testimony was not "corroborated." It did not matter how credible that testimony was. It did not matter who the prosecution's witness was. It did not matter if the evidence presented proved Defendant's guilt beyond a reasonable doubt. Rather, since there was "only" that witness, the trial court deemed the evidence insufficient as a matter of law to sustain a perjury conviction. The trial court relied upon the "two-witness rule" regarding perjury convictions and injected an additional element into this offense. However, corroboration is not an element of perjury.

The two-witness rule arose in England some 400 years ago. At that time, the common law court assumed jurisdiction over perjury cases with the abolition of the Court of Star Chamber, which had followed the practice of the ecclesiastical courts and required two witnesses in perjury cases.[2]

The rule affords two alternative methods of proof: (1) the testimony of two witnesses that statements made by the accused under oath were false, or (2) the testimony of only one such

---

[1] *People v Mendoza* 468 Mich 527; 664 NW2d 685 (2003).
[2] *United States v Chaplin*, 25 F3d 1373, 1377 (CA 7, 1994).

witness and corroborative evidence.[3] There is a huge division among the Federal circuits as to the precise formulation of the quantum, quality, and nature of the corroborative evidence required by the second alternative of the two-witness rule.[4]

Originally, the theoretical justification for the two-witness rule was that:

> In all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence and thus, if but one witness was offered, there would be merely . . . an oath against oath.[5]

This theoretical justification has no basis in the reality of the modern judicial system. Indeed, *Chaplin* went on to state:

> In light of modern notions of the function of the jury, this original justification of the two-witness rule provides a very weak rationale for the application of the rule in the contemporary trial setting.[6]

The Ninth Circuit has been even more direct in its criticism of the "two-witness" rule:

> The rule has been sharply criticized by some courts and some text writers. It has been pointed out, for example, that it is inconsistent to rule that evidence sufficient to warrant the death penalty for murder is insufficient to convict a man of perjury.[7]

This archaic rule regarding perjury convictions has never been firmly entrenched in Michigan jurisprudence. In fact, the perjury statute does not list any prerequisite regarding the number of witnesses or corroboration required in order to sustain a conviction. The statute states:

> Any person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if

---

[3] *United States v Diggs,* 560 F2d 266, 269 (CA 7, 1977).
[4] 49 ALR Fed 185, Subsec. 2.
[5] *Chaplin,* p 1377.
[6] *Id,* p 1378.
[7] *Arena v United States,* 226 F2d 227, 231 (CA 9, 1955).

committed in any other case, by imprisonment in the state prison for not more than 15 years.[8]

The next section goes on to define "perjury.":

> Definition--Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall willfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years.[9]

In *Lively,* this Court recently analyzed the statutory definition of perjury to ascertain whether the false statement must be of a "material" matter.[10] At common law, "materiality" was an element of perjury. After reviewing the statute as written, this Court stated:

> Our Legislature has thus defined perjury as a willfully false statement regarding *any* matter or thing, . . . Noticeably absent from this definition is any reference to materiality. The Legislature could easily have used a phrase such as "in regard to any *material* matter or thing," or "in regard to any matter or thing *material to the issue or cause before the court."* But the Legislature did not use such language.
>
> * * *
>
> Thus, it is reasonable to conclude that the Legislature intended for perjury to consist of a willfully false statement concerning *every* matter or thing for which an oath is authorized or required, because it did not limit the matters or things in question on the basis of their materiality.[11] [Emphasis supplied].

Likewise in the case at bar, the "two-witness" rule (corroboration) is not mentioned in the chapter defining and criminalizing perjury. The concept of corroboration in perjury prosecutions had been around for hundreds of years in the common law and applied in many jurisdictions. But, the Legislature chose not to incorporate that concept. Given the analysis and holding in *Lively,* it

---

[8] MCL 750.422..

[9] MCL 750.423.

[10] *People v Lively,* ___ Mich ___; 680 NW2d 878 (2004), analyzed MCL 750.423. That particular statute deals with perjury"outside" of the courtroom, whereas, the case at bar deals with perjury committed in the presence of the court.

[11] *Id,* p ___.

is logical and reasonable to conclude that the Legislature did not intend to include "corroboration" as an element of perjury. If it had intended that element, it would have so stated.

Plaintiff also points out that the court on its own volition has the authority to immediately arrest (commit) anyone who in the court's opinion "has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury."[12] This seems to fly in the face of any requirement that the false statement be corroborated.

Equally important to the aforementioned statutory language and analysis which reject any notion that "corroboration" is an element of perjury, is this Court's earlier holdings which repudiate the two-witness rule and narrowly tailor any corroboration requirement to those situations where a defendant makes two conflicting statements--one or both of which are under oath. In that situation, it is not enough for the prosecution to simply present both of the statements and argue one is false. Rather, the prosecutor must prove which of those statements is false.

The leading Michigan case is *McClintic.*[13] In *McClintic,* defendant made statements under oath at a probable cause hearing that he purchased liquor from an individual. Later at the [preliminary] examination of that individual, defendant denied purchasing liquor from that individual. He was charged with perjury. But at trial, there was no evidence introduced which established that the latter testimony was false, as opposed to the initial statements under oath. The Court stated,

> We think that it should be held that a conviction for perjury cannot be sustained merely upon the contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement.[14]

---

[12]MCL 750.426

[13]*People v McClintic,* 193 Mich 589; 160 NW 461 (1916).

[14]*Id.* p 601.

McClintic did not hold, and does not stand for the proposition, that all perjury convictions require corroboration. In formulating the above rule, *McClintic* cited three cases; *Billingsley,*[15] *Schwartz,*[16] and *Rhodes.*[17] The pertinent language in those cases simply supported the above quote which was succinctly stated in *Schwartz,*

> It was at one time held that when the same person has by opposite oaths asserted and denied the same fact, he may be convicted on either; for whichsoever of them is given in evidence to disprove the other, the defendant cannot be heard to deny the truth of that evidence, inasmuch as it came from him. But this doctrine has been long since exploded, and it is now held that the prosecuting attorney must elect which of the two oaths he means to rely upon as false, and he must prove the perjury in that particular statement.[18]

Billingsley added,

> The State must prove which of the two statements is false, and must show the statement relied on for perjury as being false by evidence independent of the contradictory statements of defendant or his sworn declaration.[19]

McClintic stated the obvious: Where a defendant makes two contradictory statements, at least one of which is under oath, the prosecution may not simply rely on the inconsistency to establish perjury; rather, the prosecution must establish which of the statements is false. One of the elements of perjury is a false statement under oath. It is patently obvious that the falsity of the statement under oath must be established beyond a reasonable doubt. The prosecution is not allowed the power to simply say statement A is false over statement B. Instead, evidence of why statement A is false is required.

---

[15]*Billingsley v State,* 49 Tex Crim 620; 95 SW 520 (1906).
[16]*Schwartz v Commonwealth,* 68 Va 1025; 27 Gratt 1025 (1876).
[17]*Rhodes v Commonwealth,* 78 Va 692; 1884 Va Lexis 42 (1884).
[18]*Schwartz,* 27 Gratt p 1027-1028.
[19]*Billingsley,* 49 Tex Crim p 621.

Kennedy followed *McClintic.*[20] *Kennedy*, involved a situation in which defendant gave testimony which tended to exculpate an individual charged with robbery. After the conviction in the robbery trial, defendant was arrested and interrogated by the police. He allegedly confessed that he gave false testimony at the robbery trial. He was charged with perjury. In presenting its case, the prosecution simply presented the confession and the prior testimony. It did not present any facts which established why defendant's testimony was false as opposed to the statement made out of court. The only evidence regarding the falsity of the defendant's testimony was the alleged confession which he denied at trial. Relying on *McClintic* the Court said:

> We have examined the record in this case with great care and are unable to find any evidence other than the confessions showing the falsity of the testimony upon which perjury is assigned. It follows that there is not sufficient evidence to support the verdict.[21]

Kennedy went on to state that the evidence establishing the falsity of one statement over the other must be of a "strong character and not merely corroborative in slight particulars, and it must contradict in positive terms the statement of the accused.[22] In other words, the falsity of the statement made under oath must be established beyond a reasonable doubt.

Neither *McClintic* nor *Kennedy* made any reference to the two-witness rule. Instead, they established the rule that a perjury conviction requires that the prosecution establish the falsity of the testimony by evidence outside of the defendant's own admissions or statements. This rule was followed by this Court in *Phelps,* which repudiated the two-witness rule.[23] In that case, defendant was charged with perjury for lying before a one-man grand jury. One of the issues raised by defendant was that there was no corroboration of the evidence. *Phelps* succinctly stated,

---

[20]*People v Kennedy,* 221 Mich 1; 190 NW 749 (1922).
[21]*Id,* p 5.
[22]*Id,* p 4.
[23]*People v Phelps,* 261 Mich 45; 245 NW 565 (1933).

> The evidence received at the preliminary examination is urged to be insufficient in that there is no corroboration. The early rule of direct testimony of two witnesses no longer obtains. The rule of this State appears in *People v McClintic*, . . . and under that holding, the evidence here was sufficient.[24]

Phelps described the two-witness rule as being outdated with no applicability in Michigan. Further, Plaintiff has found no reported case in Michigan prior to *Phelps* which embraced or affirmed the two-witness rule. The aforementioned alternative methods of satisfying the two-witness rule (two witnesses or one witness with corroboration) were recognized long before *McClintic*.[25] Thus, the repudiation by *Phelps* of the two-witness rule applies to the entire two-witness rule in any of its forms. After *Phelps*, a defendant could be convicted of perjury provided the evidence established guilt beyond a a reasonable doubt---without any reference to the quantity or type of evidence presented.

Taylor followed this reasoning.[26] In *Taylor*, defendant was convicted of three counts of perjury. The Court of Appeals reversed on two of the counts. Defendant then appealed to this Court which said the following,

> Defendant contends that by subsequent qualification his negative answer to the question which was the basis for the third count of perjury became an affirmative, and thus non perjurious, answer. We cannot accept this argument. Even with his qualification, the defendant in effect denied that he had any personal knowledge of any bribes to township officials.
>
> As opposed to this denial, one witness testified that he, a township official, had been bribed by the defendant. This testimony, apparently believed by the jury, is sufficient to sustain the conviction on the third count of perjury.[27]

Any doubts regarding the abolition of the two-witness rule were resolved *by Taylor*. Certainly, the Court was aware of the archaic two-witness rule but it chose to ignore it. Instead,

---

[24] *Id*, p 49.
[25] *United States v Wood*, 39 US 430; 14 Pet 430; 10 L Ed 527 (1840).
[26] *People v Taylor*, 386 Mich 204; 191 NW2d 310 (1971).

[27] *Id*, p 208.

all that was required was for the prosecution to establish defendant's guilt beyond a reasonable doubt. Taylor's conviction was based upon one witness' testimony which simply contradicted Taylor's.

Unfortunately, this Court in *Cash* misapplied one half century of precedent and made a decision which conflicts with *Phelps* and *Taylor.*[28] In *Cash,* defendant testified at a grand jury that he never gave a township official money which amounted to a kickback or bribe. At trial the township official testified that he did in fact receive illegal payments from defendant for increasing the number of traffic tickets issued in the township. The prosecution introduced a traffic book which, according to the prosecution, demonstrated an increase in the number of tickets issued during the time frame in question. The Court said, "[T]he increase in the volume of the traffic tickets shown by the traffic book is ambivalent and standing alone cannot establish the *corpus delicti.*[29]

In support of its decision, *Cash* referred to *McClintic* and *Kennedy* and said,

> The law is well established that to sustain a conviction for perjury the prosecution must prove the falsity of the statement made by the defendant. This is done by establishing the truth of its contradiction. It is not enough simply to contradict it, but evidence of the truth of the contradiction must come from evidence of circumstances bringing strong corroboration of the contradiction.[30]

McClintic and *Kennedy* did not and do not support such a blanket statement. They dealt with the situation where the defendant made contradictory **statements**, at least one of which was under oath. It was then incumbent upon the prosecution to prove which one of those statements was false. Evidence of the contradictory testimony was insufficient in establishing which

---

[28] *People v Cash,* 388 Mich 153; 200 NW2d 83 (1972).
[29] *Id,* p 162.
[30] *Id.*

statement was false. Rather, some evidence other than the defendant's prior statement must be introduced establishing the falsity was required.

Cash ignored and failed to cite either *Phelps* or *Taylor*, which said the exact opposite of *Cash*--corroborating evidence was NOT required in order to sustain a perjury conviction. The Court then hinted that the corroborative evidence must in itself be sufficient to satisfy the *corpus*. One wonders on what authority that statement was made. One wonders why *Cash* discussed *corpus* when the issue was one of corroboration.

After *Cash*, the Court of Appeals decided *Lewandowski*.[31] *Lewandowski* involved a case where a corrupt police officer was charged with multiple counts of perjury for lying to a grand jury. One of the counts was for denying that he ever took anything from a Ward's store. In his perjury trial the prosecution introduced the testimony of defendant's confederate who testified that he went into the Ward's store with defendant and they both stole an item. An item matching that description was found on defendant's property. Defendant was convicted.

Defendant appealed arguing that because of *Cash*, "strong corroboration" of the perjury was required and the evidence submitted did not meet that standard even though it obviously met the beyond a reasonable doubt standard. *Lewandowski* acknowledged a conflict between *Taylor* and *Cash*. *Lewandowski* attempted to distinguish *Taylor* by speculating on what evidence was introduced in *Taylor*. The Court then stated that since *Cash* was a more recent decision than *Taylor*, it felt duty bound to follow *Cash*. Unfortunately, *Cash* misapplied precedent. Further, neither *Cash* nor *Lewandowski* acknowledged *Phelps* which abrogated the two-witness rule some forty years earlier.

---

[31] *People v Lewandowski*, 102 Mich App 358; 301 NW2d 860 (1980).

The confusion regarding the "two-witness" rule is analogous to the confusion this Court inherited with the "reasonable expectations rule."[32] This Court in *Wilkie* said,

> Viewing the puzzling thirty-three-year history of the rule of reasonable expectations in Michigan, we are confronted with a confused jumble of ignored precedent, silently acquiesced to plurality opinions, and dicta, all of which, with little scrutiny, have piled on each other to establish authority.[33]

Similarly, in the perjury arena, there is ignored and misapplied precedent (*Phelps, Kennedy, McClintic* and *Taylor)* and a case (*Cash)* which has been cited with little scrutiny given to its underpinnings. Most importantly, the trier of fact has been deprived of its constitutional duty to weigh the evidence.

Ironically in *Lewandowski*, that very same evidence, if believed by the jury would support a conviction for the underlying theft. What sense does it make that this same evidence is now incompetent to support a perjury conviction?

This Court should follow *McClintic, Kennedy, Phelps,* and *Taylor.* Based on these decisions, the two-witness rule in all its forms is no longer viable in Michigan. The only requirement for a conviction is to prove defendant's guilt beyond a reasonable doubt. This is in accord with every other criminal statute.

Unlike the materiality of the false statement issue in *Lively,* where many of this Court's earlier decisions supported the materiality argument, corroboration has never been firmly grasped by this Court.

The Court of Appeals said it best when it stated, "The number of witnesses which a party garners is quite irrelevant in determining where the truth lies."[34] This principle is embodied in CJI2d 5.2. Likewise, CJI2d 2.6 tells the jury that it is their job to determine the facts and to

---

[32] *Wilkie v Auto-Owners*, 469 Mich 41; 664 NW2d 776 (2003).
[33] *Id,* p 60.
[34] *People v Phillips,* 112 Mich App 98, 109-110; 315 NW2d 868 (1982).

decide which testimony to believe. "Weight and credibility are questions for the jury alone."[35] The decisions of *Cash* and *Lewandowski* reject these basic principles.

Unlike the crime of treason, there is no constitutional requirement that corroboration must exist before one can be convicted of perjury or any other criminal charge.[36] This Court must not let the archaic two-witness rule which evolved from the ecclesiastical courts continue to have life in the context of the modern judicial system. The moral code of the 1600's is considerably different than the one existing today. In effect, perjury with its tradition of being handled in the religious courts has been allowed to bring forward some of the religious evidentiary requirements created over 400 years ago based upon the moral code as it then existed. However, the courts are not to mandate their own moral code.[37] Rather, the law must be applied according to the constitution and the statutes.

---

[35]*Knowles v People,* 15 Mich 408, 412; (1867).
[36]*Diggs, supra* 560 F2d 266 (CA 7, 1977).
[37]*Lawrence v Texas,* 539 US 558; 123 S Ct 2472, 2480; 156 L Ed 2d 508 (2003).

II

The double jeopardy clause bars retrial after acquittal. A directed verdict is an acquittal only where it represents a resolution of some or all of the factual elements of the charged offense. *Nix* held that a directed verdict based upon an error of law not relating to the factual resolution of the elements of the crime bars retrial. *Nix* should be overruled.

Standard of Review

This appeal involves challenges based on constitutional double jeopardy principles. A double jeopardy challenge presents a question of law that is reviewed de novo.[38]

Plaintiff urges this Court to hold, consistent with federal precedent, that only an acquittal based upon the sufficiency of the evidence bars retrial under the federal and state double jeopardy clauses.

The Federal Constitutional provision at issue is: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V. Michigan's Constitutional provision mirrors its Federal counterpart: "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1 Subsec 15.

Only a few months ago, this Court discussed the scope of Michigan's Constitutional prohibition against double jeopardy--it is identical to that of the Fifth Amendment. This Court said:

> . . . Because it is clear that the ratifiers of our 1963 Constitution intended to continue to accord the same double jeopardy protection under art 1, subsec. 15 that was provided by the Fifth Amendment, we overrule *White* and its progeny as contrary to the will of the people of the state of Michigan.[39]

In coming to this conclusion, this Court went into a detailed analysis of the history of Michigan's double jeopardy clause and the language change of that clause in the 1963 Constitution which was meant to bring that provision into conformity with the Federal

---

[38]*People v Herron,* 464 Mich 593; 628 NW2d 528 (2001).
[39]*People v Nutt,* 469 Mich 553, 596; 677 NW 2d 1 (2004).

Constitution and prior decisions of this Court.[40] Therefore, Michigan's prohibition against double jeopardy provides no greater protection than that of its federal counterpart. This discussion now turns to federal precedent.

The first United States Supreme Court case dealing with the concept of double jeopardy was *Perez* which held that retrial after a hung jury did not violate the double jeopardy provision.[41] The Court said,

> We are of the opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.[42]

The double jeopardy clause is not a bar to retrial unless there has been an adjudication on the merits. A reversal of a conviction for trial error does not bar retrial.[43] If there is a mistrial, "a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity."[44] As Perez shows, it is universally understood that in a hung jury situation, retrial is allowed.

While *Fong Foo* stated the obvious--an acquittal bars retrial--it did not have the opportunity to flesh out what constitutes "an adjudication on the merits."[45] *Martin Linen* analyzed that phrase as follows,

---

[40] *Id,* p 588-590. *Nutt* limited its analysis to the successive prosecutions strand of double jeopardy analysis.
[41] *United States v Perez,* 22 US 579; 6 L Ed 165; 9 Wheat 579 (1824).
[42] *Perez,* p 580.
[43] *Burks v United States,* 437 US 1, 15; 57 L Ed 2nd 1; 98 S Ct 2141 (1978).
[44] *People v Dawson,* 431 Mich 234, 251; 427 NW2d 886 (1988).
[45] *Fong Foo v United States,* 369 US 141; 7 L Ed 2d 629; 82 S Ct 671 (1962).

> [W]e must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.[46]

Based on the above language, only where the termination of the trial addresses the actual elements of the crime does double jeopardy preclude retrial. This Court in *People v Nix,* 453 Mich 619; 556 NW 2d 866 (1996), cited *Martin Linen,* recited its rule of law, then promptly held the opposite. *Nix* said that even if the trial court errs with respect to whether a particular factor is an element of the offense, retrial is barred when a motion for a directed verdict is granted.[47] There is no United States Supreme Court authority for this blanket statement.

Nix discounted *Scott,* in which defendant was charged with narcotics distribution.[48] After the jury was impaneled, defendant moved to dismiss two counts because of pre indictment delay The trial court granted the motion, but specifically stated that there was sufficient evidence with respect to count one. The United States appealed the dismissal.

The Supreme Court reversed and again distinguished between an acquittal on the merits which:

> . . . is obviously a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled [sic] to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.[49]

---

[46] *United States v Martin Linen Supply Co,* 430 US 564; 51 L Ed 2d 642, 651; 97 S Ct 1349 (1977).
[47] *Nix,* p 628.
[48] *United States v Scott,* 437 US 82; 57 L Ed 2d 65; 98 S Ct 2187 (1977).
[49] *Scott,* 57 L Ed 2d at 77.

Justice Boyle in her *Nix* dissent did not ignore this important language of *Scott* and confirmed that that the holding of *Nix* is not compelled by the Fifth Amendment. She said,

> Today the majority affirms a Court of Appeals decision that the defendant was acquitted when the trial judge ruled, without discharging the jury, "as a matter of law, Defendant owed no legal duty to the victim and therefore could not be convicted of either charge as a matter of law." A decision that operates to bar prosecution because of an erroneous legal ruling by a trial judge is so contrary to sound public policy that it should be rejected unless compelled. The majority's result is not compelled by decisions of the United States Supreme Court.[50]

In *Maker*, defendant was charged with fraud.[51] At defendant's request, the trial court dismissed the case because the allegations could not support the indictment. This was a legal ruling, with arguably a factual determination because the court made the ruling after reviewing transcripts. But, this factual determination did not resolve an essential element of the offense. Therefore, the double jeopardy clause did not bar retrial.

Maker relied heavily upon the language in *Scott* and *Martin Linen* which barred retrial only where there was a resolution, correct or not, of some or all of the factual elements of the offense.[52] *Maker* said,

> We believe that this language provides the crucial definition for determining whether double jeopardy bars an appeal when a proceeding is terminated on the motion of a defendant after the jury is sworn. *See, e.g., United States v. Genser*, 710 F2d 1426, 1427-28 (CA 10, 1983); *United States v. Dahlstrum*, 655 F2d 971, 974 (CA 9, 1981), *cert. denied*, 455 US 928, 71 L Ed 2d 472, 102 S. Ct. 1293 (1982); *Hawk v. Berkemer*, 610 F2d 445, 447 (CA 6, 1979). The Court did not, however, provide significant direction on how the test should be applied, because in *Scott* the trial court clearly had not made a factual determination. As we noted earlier, *see supra* note 24, the *Scott* case was dismissed because of preindictment delay, a determination that was independent of any finding related to the culpability of the defendant. Several courts of appeals have now had opportunities to apply the *Scott* test in more difficult contexts. While none has developed a bright-line formula, these courts have generally understood the test to require an acquittal only when, in terminating the proceeding, the trial

---

[50] *Nix*, dissenting opinion at 632.
[51] *United States v Maker*, 751 F2d 614 (CA 3, 1984).
[52] *Id*, p 621.

court actually resolves in favor of the defendant a factual element necessary for a criminal conviction. *See Carter v. Estelle*, 677 F2d 427, 452-53 (CA 5, 1982) (determination by the state court of appeals of "an essential element of the offense charged" was an acquittal under *Scott*), *cert. denied*, 460 US 1056, 103 S. Ct. 1508, 75 L Ed 2d 937 (1983); *United States v. Dahlstrum*, 655 F2d 971, 974 (CA 9, 1981) (although the court finds that the double jeopardy clause bars reprosecution because the defendant did not seek dismissal of the action, it also concludes that there is an acquittal under *Scott* only if "the district court's disposition *actually represented* a resolution of any of the factual elements of the offense charged" (emphasis in original)), *cert. denied*, 455 US 928, 102 S. Ct. 1293, 71 L Ed 2d 472 (1982); *United States v. Moore*, 198 US App. D.C. 296, 613 F2d 1029, 1037 (D.C. Cir. 1979) (there is no acquittal under *Scott* "unless, in ruling on the applicability of the defense, the District Court somehow reached a resolution of one or more of the elements of the offense with which he is charged"), *cert. denied*, 446 US 954, 64 L Ed 2d 811, 100 S. Ct. 2922 (1980); *Sedgwick v. Superior Court for the District of Columbia*, 190 US App. D.C. 63, 584 F2d 1044, 1049 (D.C. Cir. 1978) (*Scott* "does not bar government appeal and retrial unless [a dismissal] is premised on some *factual* determination of the insufficiency of evidence of defendant's guilt" (emphasis in original)), *cert. denied*, 439 US 1075, 99 S. Ct. 849, 59 L Ed 2d 42 (1979). *Cf. Wilkett v. United States*, 655 F2d 1007, 1012 (CA 10,. 1981) (there was no acquittal under *Scott* when the trial was terminated because the government "failed to prove an element which is more procedural than substantive, namely, venue"), *cert. denied sub nom. Conklin v. United States*, 454 US 1142, 71 L Ed 2d 294, 102 S. Ct. 1001 (1982). [53]

With all due respect, the *Nix* Court simply got it wrong. *Nix* misapplied *Martin Linen* and *Scott*. This Court's decision in *Mehall* recognizes the proper scope of double jeopardy and seems to reject the *Nix* analysis.[54] Unfortunately, *Nix* was not referenced in that decision. In *Mehall*, the jury was deadlocked and a mistrial as declared. Several weeks later, defendant moved for a directed verdict. Some months later, the motion was granted. The prosecution appealed the dismissal to the Court of Appeals which rejected the prosecution's appeal based upon double jeopardy grounds, even though the trial court erred in granting the directed verdict.

This Court in a six to zero vote reversed the Court of Appeals. Five justices said,

> As explained by the dissenting judge in the Court of Appeals, even an order that is not termed an acquittal may, in fact, rest upon a finding of insufficient

---

[53] *Id*, p 622.

[54] *People v Mehall*, 454 Mich 1; 557 NW2d 110 (1997).

> evidence. In such a circumstance, the defendant could not be retried. Conversely, an action that is labeled an acquittal may, in truth, be premised on a different ground than insufficient evidence. In that situation, it would not violate principles of double jeopardy to retry the defendant.
>
> Thus, a reviewing court must look to the substance of the decision to "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged . . . ." Id., 486, quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S. Ct. 1349; 51 L. Ed. 2d 642 (1977). Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction. *Id.*[55] [Emphasis supplied].

This Court then explained that the trial court's dismissal was an error of law because it applied the wrong legal standard when rendering its opinion. In granting the motion for directed verdict, the trial court focused upon the credibility of the evidence, not its sufficiency. Therefore, there never was a decision on the merits. This Court said,

> In ruling on the defendant's motion in the instant case, there is no indication that the visiting judge considered "all" the evidence in a light most favorable to the prosecution. Indeed, by concentrating on the complainant, and disregarding her testimony as unbelievable, the visiting judge failed altogether to rule on the sufficiency of the prosecution's proofs. Thus, there was no acquittal, regardless of how the trial court characterized its decision, and a retrial is not precluded under the Double Jeopardy Clauses of the federal and state constitutions.[56]

Mehall casts serious doubt on *Anderson* upon which *Nix* was based.[57] In *Anderson*, the trial court stopped the case halfway through the prosecution's proofs and accepted a plea, over the prosecutor's objection, to a lesser charge. While *Anderson* stands for the correct proposition that an acquittal due to insufficient evidence of the elements of the crime is not appealable, it misapplied that principle by saying an "acquittal" for lack of evidence can occur before that evidence is submitted. *Mehall* rejects this flawed analysis.

---

[55] *Id*, p 5.
[56] *Id*, p 6-7.
[57] *People v Anderson*, 409 Mich 474; 295 NW2d 482 (1980).

Mehall conflicts with *Nix*. *Mehall* follows United States Supreme Court precedent, *Nix* does not. This last quotation of *Mehall* also supports Plaintiff's contention that the federal and state constitutional prohibitions against double jeopardy are identical.

Adding more fuel to the fire is Justice Corrigan's comments in *Limmer*, in which she--joined by Justices Markman and Weaver-- stated,

> I would grant leave to appeal to revisit this Court's conclusion in *People v Nix*, 453 Mich 619 (1996), that a directed verdict granted on the basis of an error of law is nevertheless an acquittal for purposes of double jeopardy.[58]

Additionally, In *Howard* the Court of Appeals stated, "We share Chief Justice Corrigan's view that *Nix* should be reconsidered.[59]"

The Idaho Supreme Court recently had the opportunity to apply *Martin Linen*. In *Korsen*, defendant was arrested for trespassing after he created a commotion at the local friend of the court office.[60] At the close of the state's proofs, defendant moved to dismiss alleging that the statute was void for vagueness. The trial court agreed and dismissed the case. Alternatively, the court dismissed the case after concluding that insufficient evidence had been presented to support a guilty verdict. Specifically, the trial court did not believe that defendant had "done enough" to warrant his removal from the property.

In reversing the trial court's decision, the Supreme Court said,

> A defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged. *United States v. Scott*, 437 US 82, 97, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978), *quoting United States v. Martin Linen Supply Co.*, 430 US 564, 571, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977) (brackets in original). In Korsen's case, the magistrate, "as a result of legal

---

[58] *People v Limmer*, 461 Mich 974; 612 NW2d 395 (2000).

[59] *People v Howard*, unpublished opinion per curiam of the Court of Appeals, decided December 23, 2003 (Docket No. 240915).

[60] *Idaho v Korsen*, 138 Idaho 706; 69 P3d 126 (2003).

> error, determined that the government could not prove a fact that is not necessary to support a conviction." *See United States v. Maker*, 751 F2d 614, 625 (3d Cir. 1984). The Idaho courts have construed IC 18-7008(8) to not require that a property owner provide a reason for asking trespassers to get off his land. . . . Accordingly, the magistrate's acquittal was erroneously based on a lack of evidence that ultimately was not necessary to convict Korsen of trespass. This Court concludes that it was error for the magistrate to dismiss the case under Rule 29.[61]

The Court held that since the dismissal was based upon an erroneous legal conclusion, double jeopardy did not bar retrial.[62]

Our situation arose because the Defendant persuaded the trial court to add an additional requirement or element to the statutory crime of perjury. Now, Defendant claims that he cannot be retried because of double jeopardy. But, Defendant is responsible for this situation. Justice Boyle was absolutely correct in her *Nix* dissent. It makes a mockery of the entire process to allow a defendant to bastardize the law, then to claim that since the trial court agreed with him, he is somehow insulated from prosecution. Does this not encourage a criminal defendant to deliberately or carelessly mislead the trial court? The Fifth Amendment does not compel such an absurd result and this Court must not create one.

---

[61] *Id*, p 716.
[62] *Id.*

III

Corroboration is not an element of perjury. A dismissal based upon an erroneous legal ruling not relating to the sufficiency of the evidence does not implicate the double jeopardy clause of the Fifth Amendment. Retrial is permitted because the trial court dismissed the case for legal reasons not related to the sufficiency of the evidence.

Standard of Review

This appeal involves challenges based on constitutional double jeopardy principles. A double jeopardy challenge presents a question of law that is reviewed de novo.[63]

If this Court agrees with Plaintiff that corroboration is not an element of the crime of perjury, then the dismissal by the trial court was for an erroneous legal reason, not relating to the sufficiency of the evidence. If this Court agrees with Plaintiff and overrules *Nix,* then retrial is not barred because the dismissal was for a reason unrelated to factual guilt or innocence.

For the reasons stated in Arguments I and II, retrial is not barred in this case and Plaintiff asks this Court to reverse the Court of Appeals and the trial court and remand this matter to the trial court for further proceedings.

---

[63] *People v Herron,* 464 Mich 593; 628 NW2d 528 (2001).

CONCLUSION

Corroboration in perjury cases is not required by statute or constitution. In short, corroboration is not an element of perjury; rather, it is a vestige of the ecclesiastical courts. This Court repudiated the corroboration requirement (the "two witness rule") in all its forms decades ago. Perjury is like any other crime. If the elements of perjury are proven beyond a reasonable doubt, then the defendant is guilty. This is all that due process requires. The trial court erred as a matter of law when it concluded that corroboration was required.

The trial court's erroneous legal ruling did not address the merits of the case. It did not address the sufficiency of the evidence as it related to the elements of perjury. Therefore, there was not an acquittal which would preclude retrial under the double jeopardy clause. But for *Nix*, this matter would be remanded to the trial court for retrial. Because *Nix* erroneously interpreted federal precedent, Plaintiff asks this Court to overrule *Nix* and remand this matter to the trial court for further proceedings.

RELIEF REQUESTED

Plaintiff-Appellant asks that this Court rule that corroboration is not an element of perjury.

Plaintiff-Appellant further asks this Court to overrule *Nix*, reverse the Court of Appeals and remand this matter to the trial court for trial.

Dated: July 31, 2004

By _____
Jon Hulsing